Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

RALPH G. ALLEN

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT; or in the alternative, TO THE CALIFORNIA COURT OF APPEALS, SECOND APPELLATE DISTRICT, DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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Petitioner, in his proper person.

79 pp

QUESTIONS PRESENTED FOR REVIEW

1. Do the "due process" and "equal protection" clauses of the Fourteenth Amendment require criminal scienter, i.e., "willfulness" be read into California Revenue and Taxation Code Section 19401(a)?

2. California Revenue and Taxation Code, Section 19401(a) contains both a criminal and civil offense, identical in nature. Is Section 19401(a) unconstitutional because it fails to attach a higher degree of delinquency, guilt or culpability to the criminal offense contained therein, so as to distinguish the civil offense from the criminal offense?

3. Does the lack or inadequacy of regulations promulgated by the Franchise Tax Board deny Allen due process and fair notice under the law? [1]

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1. The style of this case as shown on the front cover of this Petition contains the name of all parties to this cause.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ralph G. Allen, (herein "Allen"), hereby petitions this Court for a Writ of Certiorari to the California Supreme Court, or in the alternative to the California Court of Appeals, Second Appellate District, Division Three.

OPINIONS BELOW

The Appellate Division of the California Superior Court affirming Allen's conviction in the Municipal Court, in and for the County of Los Angeles was entered on February 23, 1993, was not published; see *People v. Allen* Super. Ct. No. BR 30748. The unpublished opinion of the Superior Court appears in the Appendix at - 1 -.

Petition for reconsideration or certification to the Second District Court of Appeals was timely filed and on March 18, 1993 the Superior Court certified the appeal to the Second District Court of Appeals.

On March 31, 1993 the District Court of Appeals accepted certification and ordered transfer of the case for further hearing and decision.

The District Court of Appeals' decision affirming Allen's conviction in the California Municipal Court, was entered on November 29, 1993, and was a published decision; See, *People v. Allen*, 20 Cal.App. 846 (Dist. 2, 1993). That published opinion of the District Court of Appeals appears in the Appendix at - 7 -. Petition for rehearing was timely filed, but was denied December 17, 1993.

Request for review to the California Supreme Court was timely filed, but was denied by the Supreme Court on March 2, 1994. The denial by the California Supreme Court Appears in the Appendix at - 21 -.

JURISDICTION

The opinion and judgment sought to be reviewed by this petition was denied review by the California Supreme Court on March 2, 1994. Accordingly, this petition is timely pursuant to Rule 13.1. of the Rules of the Supreme Court. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, U.S. Code, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

Article V of the Bill of Rights, states in pertinent part:

No person shall . . . be deprived of life, liberty, or property without due process of law;

Article XIV of the Bill of Rights, states in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

California Revenue and Taxation Code Section 19401:

"Failure to file return or making false return; Penalty; Misdemeanor

Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($5,000):

(a) With or without intent to evade any requirement of this part or any lawful requirement of the Franchise Tax Board under this part, fails to file any return or to supply any

information required under this part, or who, with or without such intent, makes, renders, signs or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information.

(b) Aids, abets, advises, encourages, or counsels any individual to evade the tax imposed by this part by not filing any return or supplying any information required under this part, or, by making, rendering, signing, or verifying any false or fraudulent return or statement, or by supplying false information.

(c) Under this part, is required to pay any estimated tax or tax, who willfully fails to pay that estimated tax or tax, at the time or times required by law or regulations.

The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.

The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution."

STATEMENT OF THE CASE

Allen was charged by complaint filed on November 15, 1990 charging three (3) counts of failing to file a California tax return pursuant to Revenue and Taxation Code Section 19401(a) [1] for the years 1985, 1986 and 1987.

On July 25, 1992 Allen received a jury trial. Prior to trial Allen moved the Court to instruct the jury that

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1. All references to statutes will be to the California Revenue and Taxation Code unless otherwise stated.

"willfulness" was an element of Section 19401(a), and requested a jury instruction to that effect, instead of interpreting Section 19401(a) as a strict liability statute, requiring no general or specific intent. The Court refused to issue the requested jury instruction, and instructed the jury that intent was not an element of the offense. The Defendant timely objected to the Trial Court's instruction.

The jury found Allen guilty on all counts on July 26, 1991. On August 9, 1991 Allen rejected probation and was sentenced to 210 days on each count to be served consecutively in the County Jail.

In the appellate courts, Allen argued, inter alia, that his conviction was constitutionally infirm for the following reasons:

First, Allen argued that Section 19401(a) was wrongly interpreted as a strict liability statute which relieved the prosecution from the burden of proving criminal intent, i.e., "willfulness," which denied Allen due process and equal protection of the law; *Cheek v. United States*, U.S. , 111 S.Ct. 604, (1991); *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); *United States v. U.S. Gypsum Company*, 438 U.S. 422 (1978); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

The existence of a mens rea is the rule, not the exception, in criminal statutes. Any criminal statute omitting intent is subject to and within the scope of constitutional review, because intent serves to relieve the statute of the objection that it punishes without warning. See, *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *U.S. v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200, (1952); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494-495, 498, 102 S.Ct. 1186, 71 L.Ed.2d. 362, (1982), [civil standard]; *Boyce Motor Lines Inc. v. U.S.*, 96 L.Ed. 374, 97 L.Ed. 203, (1951), [regulatory standard]; *Morissette v. U.S.*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Second, Allen argued that Section 19401(a) is unconstitutional as it fails to set a higher standard of guilt or culpability to distinguish the civil offense from the criminal offense, which would give notice to the public what conduct will trigger application and enforcement of the criminal offense, rather than the civil offense. *Grayned*

v. City of Rockford, 408 U.S. 104, 108 109, 92 S.Ct. 2294, 33 L. Ed. 2d 222, (1972); *Spies v. United States*, 317 U.S. 492, 87 L. Ed. 298, (1943); *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, (1927). The Section's failure to so distinguish the criminal offense from the civil offense allows unconstitutional arbitrary and discriminatory applications of Section 19401(a). *Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.Ed.2d 903, 909, (1983); *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675 58, L.Ed.2d. 596, (1979); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d. 110, (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d. 447,(1965); *Wright v. Georgia*, 373 U.S. 284, 83 S.Ct. 1240 10, L.Ed.2d. 349, (1963); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930, (1910).

Next, Allen argued that in the absence of regulations required to be promulgated by the California Franchise Tax Board he is not given sufficient notice as to what constitutes a return or what information is required to be supplied to the California Franchise Tax Board so as to avoid criminal prosecution under Section 19401(a), and is thus denied due process. *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d. 228; *California Bankers Assn. v. Shultz* 416 U.S. 21, 94 S.Ct. 1494, (1974); *U.S. v. Hicks*, 947 F.2d. 1356, 1360, (9th. Cir. 1991).

REASONS FOR GRANTING THE WRIT

In the areas of law discussed above, as well as relevant sub-parts, California Courts have consistently rejected or mis-interpreted the rulings and holdings of this Court. Additionally, California Courts have created conflicts between their own decisions, which the California Supreme Court refuses to address.

California Courts have adopted the legal posture that California State tax statutes are regulatory in nature or public welfare offenses which fall under the "police powers" of the state. It is contended, by the California Courts, that since tax statutes are of this nature, violation thereof invokes punishment through a criminal and civil strict liability statute which requires no showing of criminal intent. *People v. Allen*, 20 Cal.App. 846 (Dist. 2, 1993);

People v. Kuhn, 216 C.A. 2d 956, 31 C.R. 253, (1963); *People v. Jones*, 149 Cal. App.3d Supp. 41, 197 Cal. Rptr. 273, (1983); *cf. People v. Singer* 115 C.A.3d. Supp. 11, 171 C.R. 587, (1980), (requiring scienter to be read into criminal tax statute which is silent on the matter of mens rea.)

Additionally, in *People v. Allen*, 20 Cal.App. 846 (Dist. 2, 1993), the California Appellate Court found that the burden of proof required to be met by the prosecution in a criminal case, (guilt beyond a reasonable doubt), as opposed to the burden the prosecution must carry in a civil case, (preponderance of the evidence) was the correct standard to judge Allen's guilt and therefore, the jury instructions were proper.

However, the "standard-of-proof" theory and the jury instructions thereon, relied upon by the District Court of Appeal, is not dispositive of Allen's question, To Wit: Is Section 19401(a) unconstitutional because it fails to attach a higher degree of delinquency, guilt or culpability to the criminal offense contained therein, so as to distinguish the civil offense from the criminal offense?

Section 19401(a), as this Court has consistently taught, is unconstitutionally vague as it offends the very notion of "fair play" and adequate notice as it entirely fails to distinguish the criminal offense from the civil offense, both offenses which are contained within Section 19401(a).

Finally, the district court of appeal found in the *Allen* case that all California tax statutes are self-executing, and hence, regulations are not required to implement the statute and give adequate legal notice to the public as to what is required of the people, despite the statutory directive of the California legislature, and again, contrary to this Court's teachings.

California courts must be brought into line with this Court's notions of due process, equal protection under the law, and what constitutes fair and adequate notice under the law. California's conflicting position with this Court's holdings cannot continue to co-exist as the Citizens of California have a right to uniformity of the law so they can fairly distinguish what conduct the law prohibits. For these reasons Certiorari should be granted.

STANDARD OF REVIEW

The applicable standard of review for this petition is derived from federal decisional law, construing Federal Constitutional principles. *Michigan v. Long* 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed. 2d 1201, 1214, (1983) ; *Coleman v. Thompson* 501 U.S. ___, 111 S.Ct. 2546, 2557, 115 L.Ed. 2d 640, 659.

Questions involving the interpretation of state or federal law, under the federal constitution, are settled by the United States Supreme Court, and its decisions will bind the courts of California. *United States v. Reynolds* 235 U.S. 133, 35 S.Ct. 86, 90, 59 L.Ed. 162, 168, (1914); *Brooks v. Oakland* 160 C. 423, 427, 117 P.433, (1911).

LEGISLATIVE HISTORY OF SECTION 19401

The first Personal Income Tax Law was introduced as Assembly Bill #1182, January 25, 1935, approved by the Governor on June 13, 1935. [2] It was placed under the California Constitution Article XIII, Sec. 26 (a), adopted November 05, 1974.

The Personal Income Tax Act of 1935 was subsequently repealed. [3] In 1943 it was re-enacted, at which time it clearly denoted that Section 19401 entailed a civil penalty and a criminal penalty. [4]

During the years 1943 through 1983 Section 19401 read substantially as follows:

> "Any person who, with or without intent to evade any requirement of this part or any lawful requirement of the Franchise Tax Board under this part, fails to file any return or to supply any information required under this part, or who with or without such intent,

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2. California Stats. 1935 ch. 329 pp. 1090

3. California Stats 1943 ch. 659.

4. California Stats 1943, Ch. 659 pp. 2412.

> makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, is liable for a penalty of not more than one thousand dollars ($1,000). The penalty shall be recovered by the Attorney General or the counsel for the Franchise Tax Board in the name of the people by action in any court of competent jurisdiction."

Thus, the legislature clearly imposed a civil penalty and authorized the Attorney General or other counsel to recover the same in a court of competent jurisdiction. However, the legislature did not stop at this point, but continued on to say that:

> "The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed one thousand dollars ($1,000) or be imprisoned not to exceed one year, or both, at the discretion of the court."

The criminal penalty was raised to $5,000 in 1983.[5] The Legislature further provided for recovery of costs of investigation and prosecution.[6] Additionally, as amended, the prohibitions or omissions contained within former 19401 are now contained within 19401 subsection (a).

All the offensive conduct described in the 1984 amended Section 19401(a), is virtually the same conduct included in former Section 19401.

Section 19401(a), (b) and (c) are all subject to a civil penalty of $5,000.[7] Like the pre-1984 amended Section 19401, the 1984 amended Section 19401(a) contains no element of scienter. Section 19401(b) appears to be a specific intent offense requiring affirmative acts on

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5. California Stats 1983 Ch. 1102.

6. California Stats 1984 ch. 1490

7. California Stats 1984 ch. 1490.

the part of the actor, e.g. "Aids, abets, advises, encourages or counsels any individual to evade the tax . . " Revenue and Taxation Code Section 19401(c) is a specific intent offense, i.e., "willfully fails to pay."

The last paragraph of Section 19401(c) reads, "The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution."

Section 19401, along with its subsections, was repealed, effective January 1, 1994, [8] and is now found under California Revenue and Taxation Code, Section 19701. The full text of Section 19701 appears in Appendix at - 22 -.

STATUTORY CONSTRUCTION OF SECTION 19401, POST 1984 AMENDMENT.

The California Appellate Court incorrectly found that since the legislature did not change the language of Section 19401 in its 1984 amendment, after the *Kuhn* decision, that fact in itself, was evidence that the legislature intended Section 19401 to be a strict liability statute. Tax statutes are to be strictly construed against governmental authority, *Los Angeles v. Jones* 13 C.2d 554, 561, 90 P.2d 802, though the interpretation of tax statutes in all cases, must be reasonable. *James v. U.S.*, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d. 246 (1961); *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, (1955); *Estate of Rath*, 10 C.2d 399, 75 P.2d 509.

The usual rule of statutory construction calls for the courts to scrutinize the words of the statute. *United States v. Wilson* ___ U.S. ___, 112 S.Ct. 1351, 1354-55, 117 L.Ed. 2d 593 (1992). Those are the words that the court is required to effectuate. *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594-98, 120 L.Ed. 2d 379 (1992). Courts are constrained to follow the plain

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8. California Stats 1993 ch. 31, Sec. 24 (SB 3).

meaning of the words of a statute, and need not look to legislative history where their meaning is clear on their face. *Connecticut Nat'l Bank v. Germain*, ____ U.S. ____, 112 S.Ct. 1146, 1149-50, 117 L.Ed. 2d 391 (1992). If a statute speaks with clarity to an issue judicial inquiry into the statute's meaning is finished, except in the most extraordinary circumstances.

Allen pointed out the fact that when Section 19401 was amended in 1984 that the legislature completely reconstructed it. The legislature broke Section 19401 down into three subsections - a, b, and c - arguably attaching criminal penalties only to subsection c for willful failure to pay estimated taxes.

Hence, the legislature did indeed change the construction and language of 19401 after the *Kuhn* decision; said amendment reflecting that only willful failure to pay over a tax was a misdemeanor. If that is the case, 19401(a) defining only a civil offense, would be constitutionally permissible.

However, the California Appellate Courts remain firm in their findings that Section 19401(a) is both a criminal and civil, strict liability offense, requiring no scienter. If the California Appellate Court is correct and legislative intent must be ascertained, as opposed to relying on the plain language of the statute, 19401(a) and its successor, 19701(a), is unconstitutional.

WILLFULNESS MUST BE READ INTO SECTION 19401(a), AS IT IS A CRIME UNKNOWN TO THE COMMON LAW, AND HENCE NOT A STRICT LIABILITY STATUTE.

In *United States v. Wulff* 758 F.2d 1121 (1985) the Court held that to meet due process requirements, mens rea was required to be read into a statute when the crime described was otherwise unknown to the common law and where there was a substantial penalty attached to the offense. That Court too, relied upon this Court's decision in *Morissette v. United States, supra* and came to the opposite conclusion the *Allen* Court reached, i.e., scienter must be read into a statute when the statute is silent,

where there is a substantial penalty, [9] and the crime is unknown to the common law. See, *Holdridge v. United States* 282 F.2d 302 (8th Cir. 1960); Also see Justice Brennan's concurring opinion in *United States v. Freed* 401 U.S. 601, 613 n. 4, 1112, 1120 n. 4, 28 L.Ed. 2d 356 (1971).

THE GENERAL RULE IS THAT A CRIME HAS TWO ELEMENTS, AN ACT AND MENS REA (INTENT).

One of the leading cases stating this rule is *United States v. U.S. Gypsum Company*, 438 U.S. 422 (1978). The Court reversed a conviction for price fixing brought under Section 1 of the Sherman Act. The trial court instructed the jury that no mens rea was required to convict. This Court found that "the existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." [10]

This Court further found there must be a vicious

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9. This Court has decided that the purpose of strict liability is to regulate activity which presents imminent danger to the public, thereby imposing a higher standard of care on a person. Strict liability statutes are not meant solely to punish. Many scholars and state courts have adhered to this Court's logic. *Morrissette v. United States*, 342 U.S. 246, 253-256, 72 S.Ct. 240, 96 L.Ed. 288 (1952); Also See, *State v. Dried Milk Products Co-op.*, 16 Wis. 2d 357, 114 N.W. 2d 412 (1962); *LaFave & Scott*, Criminal Law, Section 31 p. 218 (1972); *State v. Collova*, (1977) 255 N.W. 2d 581; Hall, *General Principles of Criminal Law*, c. X (2d Ed. 1960); LaFave & Scott *Criminal Law*, 218-223 (1927); Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933); Mueller, *On Common Law Mens Rea*, 42 Minn. L. Rev. 1043 (1955); Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401 (1958); Harring, *Liability Without Fault; Logic & Potential of a Developing Concept*, 1970 Wis. L. Rev. 1201; *State v. Campbell*, 536 P. 2d 105 (Alaska 1975); *Hentzner v. State*, 613 P.2d 821 (Alaska 1980).

Thus it would appear, just by reason of the severity of the punishment which can be imposed under Section 19401, that it must fall as unconstitutional unless mens rea can be read into the statute.

10. *Id.* at 435, 436.

will to constitute a crime. [11] This vicious will requirement was found to be an indispensable element of antitrust cases, even if sophisticated.

It was also held that "Mere omission . . . of intent {in the statute} will not be construed as eliminating that element from the crime denounced . . ." [12]

This Court has made it clear that strict liability offenses are limited to specific circumstances and are generally disfavored. [13] If Congress leaves out an intent requirement, the Court will very often find some level of intent.

Even in cases where strict liability is imposed, this Court still analyzes the statute's scope and reach to determine if it falls into the narrow category established.

Section 19401 must be analyzed under this Court's rigorous "regulation of business practices test" to determine if it becomes an exception to the general rule that mens rea is required in all criminal cases. This is the first step of analysis this Court requires in strict liability statutes.

The second step of analysis is to determine what "person" is liable if a regulation of business practice burden is found. The individual must be in a reasonable corporate capacity dealing with a regulatory scheme involving the public's health, safety and welfare. For individuals this is the exception to the rule requiring mens rea. So, while individuals may be found criminally liable under strict liability statutes, both elements listed above must be found to exist. To hold otherwise would broaden the reach of a strict liability statute, overriding the individual's right to a fair trial, which mandates that the prosecutor must prove all indicia of a crime, including, but not limited to, criminal

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11. Id. at 436, 437.

12. Quoting *Morrissette*, 342 U.S. at 263, *Id.* at 437.

13. *Id.* at 438.

intent. [14]

FAILING TO FILE TAX RETURNS IS NOT A REGULATORY OR PUBLIC WELFARE OFFENSE FALLING WITHIN THE POLICE POWER OF THE STATE.

The California Appellate Court was also in error in holding that Tax Statutes are police powers which are regulatory in nature, and therefore public welfare offenses. Apparently, in reaching this holding the Appellate Court's position is that the collection of taxes is of such paramount importance that all tax statutes are thus regulatory in nature. However, the Appellate Court pointed to no authority to support this proposition. Moreover, this case is not dealing with the collection of taxes -- a point which the California Courts keep missing when dealing with Section 19401. We are dealing here, with Allen's alleged failure to file a piece of paper, i.e., a tax return, with the State. The collection or payment of taxes is not at issue here!

Allen does not dispute the compelling need for the collection of taxes and that is exactly why the state legislature has decided to supply the California Franchise Tax Board with a plethora of summary administrative collection procedures which require no judicial intervention to employ, and insures the swift and unimpeded collection of taxes.

Additionally, the imposition and collection of taxes is not a power which falls under the police powers of the state as it is not that type of law which could involve

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14. *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); *United States v. Freed*, 401 U.S. 601, 609 (1971); Also see, *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565, 91 S.Ct. 1697, 1701-1702, 29 L.Ed. 2d 178 (1971); *United States v. Dotterwich*, 320 U. S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975); *United States v. White*, 322 U.S. 694 (1944); *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. A. P. Trucking Company*, 358 U.S. 121 (1958); *New York Central and Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909).

"widespread injury to the public." Rather, this power falls within the taxing powers of the state found under Article XIII of the California Constitution.

And, to the extent that *United States v. Balint* 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604, (1922) implied in its dictum that all tax statutes fell within a strict liability context; this theory was dispelled in *Spies v. U.S.*, 317 U.S. 492, 63 S.Ct. 364, 87 L. Ed. 418 (1943).

Therefore, the California Appellate Court's opinion that Section 19401(a) and all other tax statutes are regulatory in nature and hence, strict liability statutes enacted under the police powers, is clearly in error.

THE CALIFORNIA APPELLATE COURT LEFT OPEN THE QUESTION WHETHER SECTION 19401(a) WAS UNCONSTITUTIONAL BECAUSE IT FAILS TO ATTACH A HIGHER DEGREE OF DELINQUENCY, GUILT OR CULPABILITY TO THE CRIMINAL OFFENSE CONTAINED THEREIN, SO AS TO DISTINGUISH THE CIVIL OFFENSE FROM THE CRIMINAL OFFENSE.

The twist the Appellate Court put on the question Allen presented is alarming. It was the Court's position that Section 19401(a) was not unconstitutional since a criminal conviction requires a higher degree of proof than does a civil proceeding and thus the correct jury instructions as to proof beyond a reasonable doubt was given to the jury.

Allen did not present a burden-of-proof question to the Appellate Court for resolution, and; the burden of proof which must be present in a criminal proceeding as opposed to a civil proceeding in no way disposes of the fact that Allen's alleged conduct, i.e., failure to file a return, can arbitrarily be punished either civilly or criminally, under Section 19401(a), without warning, and without establishing a higher degree of guilt or culpability for the criminal offense, which would distinguish it from the civil offense. As the Appellate Court noted, "The doctrine of strict liability is not a standard of proof concept." And neither is Allen's argument.

What is being challenged is the arbitrary and discriminatory enforcement of, and punishment under a

criminal and civil statute for the identical standard of conduct -- not the standard which proves guilt in a criminal or civil proceeding! *Grayned v. City of Rockford*, 408 U.S. 104, 108 109, 92 S.Ct. 2294, 33 L. Ed. 2d 222, (1972); *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, (1927).

So, by effectively answering a question not presented to it, the Appellate Court left open the question whether 19401(a) was unconstitutional because it defined both a criminal and civil offense without establishing a higher degree of deliquency, guilt, or culpability for the criminal offense so as to distinguish it from the civil offense; as the Appellate Court only re-iterated the well-established principle that proof beyond a reasonable doubt is needed to convict in a criminal case, and a preponderance of evidence is needed in a civil case.

The ambiguous combination of civil and criminal liability within Section 19401(a) fails to establish a penalty suitable to every degree of delinquency. [15] Instead, 19401(a) establishes civil and criminal penalties for the same degree of delinquency.

In answer to a similar question, the validity of a Minnesota civil and criminal trespass statute was determined by this Court, in *Shevlin-Carpenter v. Minnesota, supra.*

In *Shevlin*, a Minnesota trespass statute made cutting and removing timber from state lands without a permit punishable by double damages for "casual and involuntary" trespasses and treble damages, fine and imprisonment for "wilful" trespasses. Section 7 of the statute contained the provisions relating to double and treble damages. A separate paragraph designated the felony, expressly requiring willfulness. [16] The Defendants in *Shevlin* were initially adjudged "willful violators" of the statute and were assessed damages at treble the value of the timber. The Supreme Court of Minnesota reduced the judgment to double damages finding the trial court's

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15. *Spies v. United States, supra.*

16. *Id.*, at page 57

finding of willful trespass unsustained by the evidence.

This Court affirmed the judgment which assessed double damages against the defendants. Based on the Court's rationale, Allen asserts that had the *Shevlin* Court considered 19401(a), it is probable that it would have held 19401(a) unconstitutional, as there is no distinction between the civil offense and the criminal misdemeanor.

As argued by Allen in the State Court, and under the rationale of this Court, 19401(a) is unconstitutional as it allows for arbitrary and discriminatory enforcement.

ALLEN WAS NOT GIVEN NOTICE BY STATUTE OR REGULATION AS TO WHAT RETURN HE WAS REQUIRED TO FILE, OR WHAT INFORMATION HE WAS REQUIRED TO SUPPLY.

The Appellate Court also found that Allen had adequate notice of Section 19401(a) requirements. Allen did not present such a question, as Section 19401(a) does not require anything, it merely is designed to punish the failure to perform under some other unidentified Section of the Revenue and Taxation Code.

Allen contended that not only did Section 19401(a) fail to advise him of a lawful requirement or what return or information is to be supplied, but additionally the California Personal Income Tax Laws are also wholly inadequate to give notice to Allen of what the law requires - and therefore Allen cannot be punished for failing to do that which the law does not require. *Viereck v. United States*, 318 U.S. 236, 63 S.Ct. 561, (1943).

The Appellate Court also must have recognized the deficit left by the lack of regulations to carry out the statutory commands of the legislature, which are provided for by Section 19253, [17] as it could only direct Allen to Division 2 Part 10, Chapter 17, Articles 1 and 2 of the Revenue and Taxation Code, without citing the specific

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17. **19253. Rules and regulations, retroactivity.** The Franchise Tax Board shall prescribe all rules and regulations necessary for the enforcement of this part and may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect.

sections of the law which require the specific type of return the law requires, or the information which the law requires to be placed on the return.

There are no specifics -- For Example: Under Section 18401 we know that "Every individual taxable . . . shall make a return". How can one determine, from the broad language of the statute what constitutes a return under Section 18401 by examining Articles 1 and 2 of Chapter 17? Simply, it cannot be determined, so one presumably would have to consult the regulations to determine the return to be used. See, *U.S. v. Hicks*, 947 F. 2d 1356, (9th Cir. 1991). But there are no regulations to consult, as they were repealed in 1982.

Merely because the Franchise Tax Board distributes blank forms throughout the State, pursuant to Section 18431, a legal duty to use that form does not arise unless the law compels the use of the form, and gives notice to the public that this is the form authorized by law. Section 18431 requires nothing of the public. [18] Rather it directs the Franchise Tax Board to distribute blank forms, said form to be executed under penalties of perjury when "made under any provision of this part **or regulations**."

Neither Article 1, nor Article 2 of Chapter 17 of the California Personal Income Tax Laws gives Allen notice of what the law requires and there are no regulations which would provide Allen with adequate notice of what the law requires. *California Bankers Assn. v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, (1974).

Therefore, in the absence of regulations which inform Allen of the specific return to file, or specific information to furnish, there is no lawful requirement for Allen to file a return or supply information for which he can be punished. To cure this, all the California Franchise Tax Board has to do is emulate the Internal Revenue Service and enact regulations.

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18. Section 18431 appears in the Appendix at - 24 -.

CONCLUSION

The California Appellate Courts have unhesitatingly departed from this Court's holdings when interpreting strict liability laws, and concepts. Additionally, the California Supreme Court fails to review and correct the lower appellate courts' flawed reasoning. This failure affects the lives of each citizen in the State of California as every citizen is subject to arrest, trial, and conviction for violation of a law, even in the absence of mens rea, so long as the California State Legislature remains silent regarding scienter when enacting the criminal statute.

Additionally, the California Court of Appeal, Second Appellate District failed to address the constitutionality of Section 19401 inasmuch as 19401 does not distinguish between its criminal and civil application of the statute.

Finally, the California Appellate Courts have wrongly determined that the California Taxing Statutes are self-executing and that the absence of regulations does not deprive a citizen of fair notice under the due process clause of the United States Constitution.

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the judgment of the California Court of Appeal, Second Appellate District, Division Three.

Respectfully Submitted,

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